No. 88-1503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NANCY BETH CRUZAN, BY HER PARENTS AND CO-GUARDIANS, LESTER L. AND JOYCE CRUZAN,

Petitioners,

v.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, AND ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,

Respondents.

v.

THAD C. MCCANSE, GUARDIAN AD LITEM,

Respondent.

On Writ of Certiorari to the Missouri Supreme Court

BRIEF OF CHRISTIAN ACTION COUNCIL, LUTHERANS FOR LIFE, MORAVIANS FOR LIFE, ORTHODOX CHRISTIANS FOR LIFE, SOUTHERN BAPTISTS FOR LIFE AND WELS LUTHERAN FOR LIFE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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ROBERT L. SASSONE
Attorney at Law
900 North Broadway • Suite 725
Santa Ana, California 92701
(714) 547-5611

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE ON BEHALF OF RESPONDENT

Amici hereby respectfully move for leave to file a brief amicus curiae in the present case. Requested consent of parties is expected but has not yet been received and filed. When filed, it will make this motion unnecessary.

INTEREST OF AMICI

Christian Action Council

Christian Action Council (CAC) is a nonprofit organization incorporated in 1975 under the laws of the District of Columbia. CAC represents thousands of evangelical Christians in voicing concern on the life issues of abortion, euthanasia, and infanticide. As part of its ongoing ministry and as a response to the euthanasia issue, CAC has developed a model of ministry and care to the terminally ill to be implemented within local churches.

Lutherans for Life

Lutherans For Life (LFL) is a national, pan-Lutheran pro-life organization seeking to restore respect for life at all its stages from fertilization to natural death. LFL's objectives include

educating in the areas of abortion, infanticide, euthanasia, chastity and post-abortion trauma. Through its ten chartered state affiliates and over 200 local chapters nationwide, its publications, educational materials and audio-visual resources, LFL promotes the ethic that the elderly, terminally ill, comatose or otherwise incapacitated person is to be treated with compassion and dignity, using ordinary, appropriate means to maintain their health.

We oppose all attempts to legalize or condone euthanasia, which is the intentional effort to cause death or speed up the dying process by withholding of ordinary, appropriate, reasonable and prudent medical care.

Lutherans For Life is a nonprofit corporation with national offices in St. Paul, Minnesota.

Moravians For Life

Moravians For Life is pro-life organization comprised of individual members of the Moravian Church in the United States and Canada. We are committed to pro-life education and advocacy, which includes the fight against attempts to legitimize infanticide and euthanasia in the United States and Canada. We consider these acts to be against all forms of rational human rights programs and have pledged to work for the rescue of those being led away to death.

Orthodox Christians for Life

Orthodox Christians for Life is a religious-educational pro-life organization consisting of members from all the jurisdictions of the Eastern Orthodox Church in the United States and Canada. It was founded and functions in a

spirit of synergistic cooperation with the hierarchy, clergy, and laity of the Orthodox Church regardless of jurisdiction or location. The organization supports the doctrines and canons of the Church.

In its moral teachings, the Orthodox Church condemns euthanasia, either "passive" or "active." The Church remains a witness to historical Christianity's understanding of the sacredness of human life. This is reflected by the following resolutions adopted by the Sixth All-American council of the Orthodox Church in America (Nov. 10-14, 1980): "... that human life in all its forms is sacred, and every means must be used for its preservation, protection and defense: political, economic, legal, moral, and religious ..." and "... that while, in

some cases, the artificial prolongation of a person's biological life may be inconsistent with the proper understanding of human life, it is to be clearly distinguished from euthanasia with horror as any other form of deliberate murder." The Orthodox Church considers such basic needs as nutrition and hydration as "ordinary care" and not "medical care." The withholding of such basic bodily needs which would result in the death of an individual is considered to be a form of euthanasia. Orthodox Christians for Life supports and advocates these historical positions and promotes them not only to the faithful, but to the secular culture at large.

Southern Baptists for Life

Southern Baptists for Life (SBL) is a nonprofit pro-life advocacy organiza-

tion incorporated in the State of Missouri. SBL was established for the purpose of helping Southern Baptists take a firm, visible, and active stand against abortion, infanticide, and euthanasia. SBL concurs fully with the resolution on abortion passed at the 1982 Southern Baptist Convention, "... that all human life, both born and preborn, is sacred, bearing the image of God, and is not subject to personal judgments as to "quality of life" based on such subjective criteria as stage of development, abnormality, intelligence level, degree of dependency, cost of medical treatment, or inconvenience to parents." SBL is governed by a six member board of directors and a fifteen member advisory board and provides pro-life resources to

thirty-seven thousand Southern Baptist churches.

United Church of Christ Friends for Life

United Church of Christ Friends for Life is a duly constituted special interest group within the United Church of Christ which was founded to speak for the sanctity of human life within our denomination. Our focus is primarily on the unborn, the handicapped, and the elderly whose lives are threatened by abortion, infanticide, and euthanasia.

Because the scriptures teach that human beings are created in the image of God, we believe all human life is endowed by ~~God~~ with inviolable worth and dignity. This ethic calls us to protect human life through every stage of its development from conception to natural death, irrespective of age, health,

function in society, or condition of dependency.

WELS Lutherans for Life

WELS Lutherans for Life is a para-synod organization in fellowship with the 440,000 member Wisconsin Evangelical Lutheran Synod (WELS). WELS Lutherans for Life is a specialized ministry seeking to make known God's will on life and to provide assistance to others in life issues. God's will concerning euthanasia and the right to die is clear, recognizing that He acknowledges the absolute value of human life despite its varying or diminished quality. WELS Lutherans for Life stands by the conviction that it is contrary to the will of God either actively to take life or to fail to protect life when death is not imminent.

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SUMMARY OF ARGUMENT

This case presents the Court an opportunity to affirm the right to live of the incompetent, the incurably ill, and the weak members of our society. If the fundamental right to life of Nancy Cruzan is denied in favor of the competing interests of the appellants, this same right may in the future be denied to others whose medical circumstances are progressively less extreme, but whose continued existence represents no less of an expense, a distress, or an inconvenience to the other parties who may successfully seek relief in the courts at the cost of the lives of the infirm individuals.

ARGUMENT

The nature of the action sought to be taken towards Nancy Cruzan should be emphasized. If petitioners' request is granted, the removal from Nancy Cruzan of artificial hydration and nutrition will directly result in her death. As the Missouri Supreme Court notes:

"Nancy is not dead. Nor is she terminally ill. This is a case in which we are asked to allow the medical profession to make Nancy die by starvation and dehydration. The debate here is thus not between life and death; it is between quality of life and death." Cruzan v Harmon, 760 S.W.2d 408, at 412, emphasis added.

In short, the requests of Nancy Cruzan's guardians, no matter how well intended, amount to a request to terminate her life. Artificially attached hydration and nutrition has traditionally been viewed by the medical community as comfort care. Hydration and nutrition artificially received will not cure any ailment or condition but merely provide basic necessities of life. However, the removal of such necessities guarantees an eventual death from starvation and dehydration. Such a death can hardly be considered "dignified".

Acknowledging the adage attributed to George Santayana that "those who cannot remember the past are condemned to repeat it" we urge the Court to consider the experience of Germany during the late 1930's and early 1940's under tne Third Reich. We are not herein seeking to identify any contemporary individuals with the Nazis, their beliefs, or their practices, but rather we are attempting to demonstrate that, in the past, a well educated and highly civilized Western

nation was induced to accept by small steps the eventual widespread killing of its infirm and minority citizens by so-called euthanasia. It should be kept in mind that in the period prior to World War II, German medicine occupied a place of world-wide preeminence. It was the country of choice for post-graduate medical studies, much as the United States is today.

Writing in 1949 about the Hadamar Hospital, a medical facility which became an "extermination institution" during the Nazi era, the Hon. Robert H. Jackson, then an Associate Justice of the U.S. Supreme Court and formerly U.S. Chief Counsel for the Nuremburg Trials, said:

"A freedom loving people will find in the records of the war crimes trials instructions as to the roads which lead to such a regime and <u>the subtle first</u>

<u>steps that must be avoided</u>. Even the Nazis probably would have surprised themselves, and certainly they would have shocked many German people, had they proposed as a single step to establish the kind of extermination institution that the evidence shows the Hadamar Hospital became. But the end was not thus reached; it was achieved in easy stages.

To begin with, it involved only the incurably sick, insane and mentally deficient patients of the institution. It was easy to see that they were a substantial burden to society, and life was probably of little comfort to them. It is not difficult to see how, religious scruples apart, a policy of easing such persons out of the world by a completely painless method could appeal to a hard-pressed and unsentimental people. <u>But "euthanasia" taught the art of</u>

killing and accustomed those who directed and those who administered the death injections to the taking of human life. Once any scruples and inhibitions about killing were overcome and the custom was established, there followed naturally an indifference as to what lives were taken. Perhaps also those who become involved in any killings are not to be in a good position to decline further requests. If one is convinced that a person should be put out of the way because, from no fault of his own, he has ceased to be a social asset, it is not hard to satisfy the conscience that those who are willful enemies of the prevailing social order have no better right to exist. And so Hadamar drifted from a hospital to a human slaughter-house."[1. Jackson, Robert H., from "The Hadamar Trial, Foreword," Hodge and Co. & Ltd., 1949,

(emphasis added).]

As emphasized above, Jackson noted that a cadre of medical personnel became the administrators of killing by euthanasia. This constituted a rejection of traditional medical ethics as summarized by the Oath of Hippocrates, which says in part, "Neither will I administer a poison to anyone when asked to do so, nor will I suggest such a course." Andrew Ivy MD was called by the prosecution at the Nuremburg Trials as an expert witness on medical ethics. After testifying, he analyzed the Nazi war crimes of a medical nature for the Journal of the American Medical Association. He commented on his insights and on the Oath of Hippocrates as follows:

"Though I had been in medicine for thirty years, I realized, for the first

time at the Nuremburg Trials, the full meaning and importance of the contributions of Hippocrates and his school to medicine and human welfare.

Hippocrates contributed the scientific philosophy of medicine as we know it today when he taught that disease is due to material causes and not to evil spirits, witches or the wrath of gods. He contributed a technical philosophy when he taught that diligence, accuracy, thoroughness in observation and skill were essential for success in the practice of a science and art of medicine. He apparently realized that a scientific and technical philosophy of medicine could not survive through the ages unless it was associated with a sound moral philosophy."[2. Ivy, JAMA, vol. 139, no. 3, 1/15/49, p. 131]

It must be here noted that the Oath

of Hippocrates has been modified recently in the United States to make ethical accommodations to changes in the law. The Oath originally contained the line, "I will not give to a woman an abortive remedy." Responding to Roe v. Wade, most medical schools either dropped the line entirely, or substituted "I will do nothing illegal." Some medical schools use The Declaration of Geneva rather than the Oath of Hippocrates. Adopted in 1948 by the General Assembly of the World Medical Association, it contains the sentence, "I will maintain the utmost respect for human life from the time of conception." Since 1973, many medical schools have dropped the phrase, "from the time of conception." Thus, one of the effects of legalized abortion has been to create a precedent for plasticity in American medical ethics. Applying the

current reasoning, that what is legal is medically ethical, we see that with euthanasia the only missing ingredient is legalization via legislation or case law. Traditional medical ethics and oaths, although perhaps thousands of years old, will not stand in the way.

Dr. Ivy also noted that the large loss of human life through medical war crimes and euthanasia was accomplished by a small number of doctors. He said, "It should be emphasized that the larger portion of German medicine remained ethical."[3. Ibid.] Our experience with legalized abortion in the United States, in which a few hundred abortion specialists perform a large part of the 1.5 million abortions that are done annually, should warn us about the possibilities that could occur with relaxed access to euthanasia. One author

of fiction has already proposed a future scenario for America in which a few medical specialists called "thanatologists" perform "releases" upon their patients, a large portion of whom are victims of the AIDS epidemic who are required by law to undergo "release" rather than bankrupt the health care system with their expensive end care.[4. Marzen, Thomas J., "AIDS Changed Ethics, Law," unpublished short story. Also of interest in this connection is an unpublished paper "AIDS and the Future" by the same author.]

Two presently observable factors strongly suggest that there are forces in our society which will press unyieldingly for relaxed and broadened access to euthanasia should the Court initiate such a process by the case presently before it. First is the growing demand for

organs for surgical transplantation. Second is the stated strategy of the pro-euthanasia movement to introduce their program into American society by a series of small steps.

Some medical theorists are currently toying with the concept of "cognitive death" as a replacement for the concept of brain death. Whereas brain death means one is dead if he has no sign of consciousness and cannot sustain breathing and other autonomic body functions controlled by the brain stem, "cognitive death" means one is dead if he is not conscious and appears to have little chance of regaining consciousness. The introduction of such a concept, coupled with the progressive legalization of euthanasia, will bring forward as euthanasia candidates the approximately 10,000 nursing home patients living in

persistent vegetative states. Their problem is not that they are unconscious, or that they are particularly expensive to feed (about $10 per day). Their problem is that they are "biologically tenacious" and possess a full set of healthy organs that, in the minds of some, they are not being put to good use.

Writer Kathleen Stein, in an article entitled "Last Rights," made the following observations.

"Even as we struggle with brain death, the concept is being modified. Bioethicists and members of the the medical profession think the definition of death should encompass not only those who have no brain functions (the brain dead) but also those who have lost consciousness (the cognitive dead), 'lost souls' who linger mindlessly in what are called persistent vegetative states."

She later observes:

"...But over the next 20 years, the overwhelming demand for organs may increase the pressure to declare the "brain absent" dead. There is already something of a black market for buying and selling organs. If the cognitive-death definition were instituted, organ merchandising corporations might establish enterprises beyond Wall Street's wildest insider fantasies. The world would find itself in a situation where death itself would be an industry-an economic incentive."[5. Stein, Kathleen, "Last Rights," in Omni, vol. 9, no. 12, 9/87, p.59.]

As organ transplant technology becomes more widely available, it is inhibited by the severe shortage of donors and the fact that the donors are brain dead, their life processes being

sustained by expensive ICU equipment while awaiting consent of the family and correct timing for transplantation. Also, there are possible quality problems associated with the organs of recent trauma victims and dead individuals on ventilators. All of these problems will be readily solved by making available the organs of comparatively healthy patients who are in persistent vegetative states. It is almost certain that organ transplant technology will be a major element in the drive for legalized euthanasia.

A second major factor in the trend toward relaxed standards is the pressure from euthanasia-promoting organizations. Mr. Derek Humphrey, Executive Director of the pro euthanasia Hemlock Society has stated in an interview with a periodical opposed to his viewpoint, "We have to go

stage by stage, with the living will, with the power of attorney, with the withdrawal of this; we have to go stage by stage. Your side would call that the 'slippery slope'"[6. from an interview with NRL News on 12/18/86, quoted in O'Steen, David, Euthanasia: Modern America's Rendezvous with Death, NRL Education Trust Fund, 1988.]

Undoubtedly, the pro-euthanasia organizations will continue to press, one step at a time, for full legalization of "voluntary" euthanasia. Should they succeed and make voluntary death by lethal drugs an accepted part of life in America, it is possible that euthanasia of an involuntary sort could not ever be prevented from becoming an acceptable solution to many of society's difficult problems.

In this connection, we must consider

the larger issue of our failure as a society to cope with major social problems which continue to defy solution. Examples are poverty, drug addiction, and homelessness. Considering the extent and the difficulty of these problems, can we afford to depart from a doctrine that every human being is a person and the life of of every innocent person is sacred?

Justice Jackson noted a connection between the practice of euthanasia for medical reason in Germany and the eventual mass killings of millions of innocent persons who were deemed opponents by the Nazis. "If one is convinced that a person should be put out of the way because, from no fault of his own, he has ceased to be a social asset, it is not hard to satisfy the conscience that those who are willful enemies of the

prevailing social order have no better right to exist."[7. Jackson, op. cit.] Dr. Ivy also was convinced of a connection between euthanasia and the eventual mass executions. He said, "However, I should again point out that the mass killings--the gassing chambers--were related to the euthanasia edict secretly issued by Hitler in 1939.[8. Ivy, op. cit.]

The ultimate danger of allowing one category of innocent citizens to be legally killed by direct human actions is amply demonstrated by Germany's experience. Once the principal is established, it is too easy to add one more category of innocent persons, and then another.

In the words of another writer, "Once a practice is endorsed, it develops a critical mass, quickly creating a

medical, political and financial constituency of its own. In a remarkably short time, it is locked into place. And when the unthinkable becomes commonplace, it merely makes it easier for other unthinkable acts to make a similar leap....But we have advantages the Germans did not have. We know about the consequences of their ideas, and we know to what ends they led them. The parallels ...are not, of course, exact. But the echoes are real enough, and they are increasingly ominous. [9 Sykes, Charles J "From Small Beginnings: The Medical Nightmare," in Noel News, vol IV:vi, reprinted from the Catholic League for Religious and Civil Rights]

Commenting upon the fact that doctors will inevitably be the ones called upon to perform the killings if euthanasia is legally permitted, Dr Ivy noted that:

"Medical ethics pledges that physicians are conservators rather than destroyers of life. In my opinion, medicine is doomed if it ever consents to take part or permits any member in good standing to take part in a program of euthanasia applied for socioeconomic purposes. If euthanasia is ever introduced for such purposes, medicine should have none of it. Medicine should let the persons responsible for introducing it do the killing. Physicians are conservators, not destroyers of life. [10 Ivy Op Cit]

In the present case before the Court, the stated interest of the appellants may not be socioeconomic factors as described by Dr Ivy. However, we assert that if a breach is opened in the dike by allowing Nancy Cruzan to be killed by those who would end her life, it will only be a

matter of time before similar and more active forms of euthanasia will be practiced for mainly socioeconomic reasons.

"We hold these truths to be self evident: that all men are created equal; that they are endowed by their creator with certain unalienable rights; that among these are Life.." With the continued protections of the right to life of all innocent human persons in mind, we ask this Court to affirm the right of Nancy Cruzan to live.

CONCLUSION

We offer for the Court's consideration part of the analysis of the Nazi German experience by Dr Leo Alexander, one of the expert medical witnesses at the Nuremburg Trials. Dr Alexander was an Assistant Professor of Psychiatry at Tufts University Medical

School, Boston, when the article, entitled "Medical Science Under Dictatorship" was published in 1949 in the New England Journal of Medicine (241:39-47, 1949).

Doctor Alexander stated in part:

Whatever proportions these crimes finally assumed, it became evident to all who investigated them that they had started from small beginnings. The beginnings at first were merely a subtle shift in the basic attitude of the physicians. It started with the acceptance of the attitude, basic in the euthanasia movement, that there is such a thing as life not worthy to be lived. This attitude in its early stages concerned itself merely with the severly and chronically sick. Gradually the sphere of those to be included in this category was enlarged to encompass the

socially unproductive, the ideologically unwanted, the racially unwanted and finally all non-Germans. But it is important to realize that the infinitely small wedged-in lever from which this entire trend of mind received its impetus was the attitude toward the nonrehabilitable sick.

Respectfully Submitted, Robert L Sassone

ROBERT L SASSONE & THOMAS A GLESSNER,

Attorneys for amici

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Respondent.

Affidavit of mailing of amicus brief copies, Rule 28.2

State of California }ss.
City of Santa Ana, County of Orange }

Robert L Sassone, being first duly sworn on his oath deposes and says:

Robert L Sassone is a member of the bar of the United States Supreme Court admitted October 26, 1971. To his knowledge, on October 11, 1989, within the particular time and permitted time for serving of said amicus brief pursuant to Rule 28.2, he deposited in the United States Mailbox at Santa Ana, CA 92701 pursuant to Rule 28.2 with first class postage prepaid 40 copies of the attached amicus brief in the present case properly addressed to the Clerk of the United States Supreme Court and three copies of said amicus brief to each party addressed as follows:

WILLIAM L WEBSTER
ATTORNEY GENERAL
C/O ROBERT PRESSON
PO BOX 899
JEFFERSON CITY, MO 65102

THAD McCANS, ESQ
400 GRANT ST
CARTHAGE, MO 64836
C/O FLANAGAN, McCANS & LANSLEY

WILLIAM H COLBY, ESQ
SHOOK, HARDY & BACON
1200 MAIN ST
KANSAS CITY, MO 64105

Robert L Sassone

ROBERT L SASSONE, Affiant,

Subscribed and sworn to before me on October 11, 1989,

Lawrence D Sassone

Lawrence D Sassone, Notary Public

OFFICIAL SEAL
LAWRENCE D SASSONE
NOTARY PUBLIC-CALIFORNIA
ORANGE COUNTY
MY COMM. EXP. DEC. 27,1989